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**Superior Protection, Inc., and
John F. Heard, Jr., indi-
vidually and United Govern-
ment Security Officers of
America, for and on Behalf
of Local 229.** Case 16–CA–21399

April 30, 2009

**SECOND SUPPLEMENTAL DECISION
AND ORDER**

BY CHAIRMAN LIEBMAN AND MEMBER
SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondents have failed to file a timely answer to the compliance specification.

On July 31, 2003, the Board issued a Decision and Order,¹ directing Respondent Superior Protection, Inc., its officers, agents, successors, and assigns, to make whole Kelvin Trotter for any loss of earnings and other benefits resulting from his suspension, probation, and termination in violation of Section 8(a)(4), (3), and (1) of the Act. On July 26, 2004, the United States Court of Appeals for the Fifth Circuit enforced the Board's Order.² Thereafter, Respondent Superior Protection, Inc. reinstated Trotter but failed to make him whole as required by the Board's Order.

On August 31, 2006, the Board issued a Supplemental Decision and Order,³ ordering the Respondent, Superior Protection, Inc., inter alia, to pay Trotter \$123,907.87, plus interest, minus tax withholdings required by Federal and State laws. On December 11, 2006, the United States Court of Appeals for the Fifth Circuit enforced the Board's Order.⁴

A controversy having arisen over whether John F. Heard Jr. should be held jointly and severally liable for the backpay owed Trotter, the Regional Director issued a compliance specification and notice of hearing on October 31, 2008, notifying Superior Protection and Heard (the Respondents) that they should file timely answers complying with the Board's Rules and Regulations. Although properly served with copies of the compliance specification, the Respondents failed to file timely answers to the compliance specification.⁵

On January 6, 2009, the General Counsel filed a Motion for Default Judgment with the Board. On January 14, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On January 28, 2009, Respondent Heard filed a document entitled "Response to the Notice to Show Cause and Default," and, on March 11, 2009, the General Counsel filed a responsive pleading.⁶

⁵ As set forth in the General Counsel's motion, counsel for the General Counsel made repeated efforts to ensure that Respondent Heard was aware of the importance of filing an answer. On December 3, 2008, after Heard had missed the first filing deadline of November 21, 2008, counsel for the General Counsel spoke with Heard via telephone to inquire about his failure to provide an answer. After Heard informed him that he had not yet received a copy of the compliance specification, counsel for the General Counsel mailed an additional copy of the compliance specification to Heard's home address and extended the deadline for filing an answer to December 24, 2008. After that new deadline passed without Heard having filed an answer, counsel for the General Counsel again called Heard, inquiring whether he still intended to file an answer. When Heard indicated that he wished to respond, the General Counsel extended the filing date a second time to January 5, 2009. This deadline also passed without Heard having filed an answer.

⁶ Respondent Superior Protection, Inc. has not filed any answer to the compliance specification or to the Notice to Show Cause.

¹ 339 NLRB 954 (2003).

² 105 Fed. Appx. 561.

³ 347 NLRB 1197 (2006).

⁴ No. 06–60940.

Ruling on the Motion for Default Judgment⁷

Section 102.56(a) of the Board's Rules and Regulations provides that the respondent shall file an answer within 21 days from service of a compliance specification. Section 102.56(c) provides that if the respondent fails to file an answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate.

According to the uncontroverted allegations of the Motion for Default Judgment, the Respondents, despite having been advised of the filing requirements, have failed to file a timely answer to the amended compliance specification.

In opposition to the Board's Notice to Show Cause, Respondent Heard asserts that prior to January 28, 2009, he had been without counsel and did not believe that it was necessary for him to respond to the amended compliance specification, despite the notices sent by the General Counsel. Heard further asserts that once he realized that the underlying matter had not been settled by the previous owners of Superior Protection he hired counsel.

We find that the Respondent's failure to file a timely answer has not been supported by a showing of good cause. The essence of Respondent Heard's position is that, because he was not represented by counsel prior to January

28, 2009, he failed to fully understand the ramifications of his failure to file an answer.

Although the Board has shown some leniency toward respondents who proceed without the benefit of counsel, the Board has consistently held that pro se status alone does not establish a good cause explanation for failing to file a timely answer.⁸ See, e.g., *Patrician Assisted Living Facility*, above at fn. 8; *Sage Professional Painting Co.*, 338 NLRB 1068 (2003). Where a pro se respondent fails to timely file an answer, despite being reminded to do so, and provides no good cause explanation for its failure to file a timely answer, subsequent attempts to file an answer will be denied as untimely. *Id.* at 1153–1154 (citing *Kenco Electric & Signs*, 325 NLRB 1118 (1998)).

Here, there is no dispute that Respondent Heard did not answer the amended compliance specification until after the Notice to Show Cause issued on January 14, despite counsel for the General Counsel's repeated, explicit directions to do so. We also find that Heard has not provided an explanation sufficient to constitute good cause for his failure to file a timely answer even after he was granted more than one extension of time. As explained above, Heard's assertion that his status as a pro se litigant should be deemed "good cause" for his failure to file a timely answer is without merit.

Accordingly, we reject Respondent Heard's answer to the compliance specification as untimely, and we grant the General Counsel's

⁷ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

⁸ As Member Schaumber explained in his dissent in *Patrician Assisted Living Facility*, 339 NLRB 1153 (2003), he disagrees with extant Board precedent that circumscribes the "good cause" proviso to mean good cause for missing a filing deadline, rather than good cause not to deem allegations admitted. See also *NLRB v. Washington Star*, 732 F.2d 974 (D.C. Cir. 1984). In considering motions for default judgment, Member Schaumber would utilize the same standard for setting aside an entry of default as used by the Federal courts under Rule 55(c), and would examine three factors: (1) the reason or reasons the answer was untimely, (2) the merits of the respondent's defense, and (3) whether any party would suffer prejudice were the default set aside. While he remains of that view, he acknowledges that granting default here is consistent with Board precedent and with the Board's longstanding interpretation of its own rules. Thus, in the absence of a Board majority to change Board law, and for institutional reasons, Member Schaumber applies that precedent here.

Motion for Default Judgment. We conclude that the Respondents are liable for the net backpay due Kelvin Trotter as stated in the amended compliance specification. We will order the Respondents to pay that amount to Kelvin Trotter, plus interest accrued to the date of payment.

ORDER

The National Labor Relations Board orders that the Respondent, Superior Protection, Inc., Houston, Texas, its officers, agents, successors, and assigns, and Respondent John F. Heard Jr., an individual, shall jointly and severally make whole Kelvin Trotter by paying him the amount following his name, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), mi-

nus tax withholdings required by Federal and State laws:

Kelvin Trotter \$123,907.87

TOTAL AMOUNT DUE \$123,907.87

Dated, Washington, D.C. April 30, 2009

Wilma B. Liebman,

Chair-
man

Peter C. Schaumber,

Member

(SEAL)
BOARD

NATIONAL LABOR RELATIONS